United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-2099

To be argued by
PHYLIS SKLOOT BAMBERGER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LEONARD SHELTON,

Petitioner-Appellant,

-against-

LARRY TAYLOR, WARDEN AND
MAURICE SIGLER, CHAIRMAN,
UNITED STATES BOARD OF PAROLE,

Respondents-Appellees.

Docket No. 76-2099

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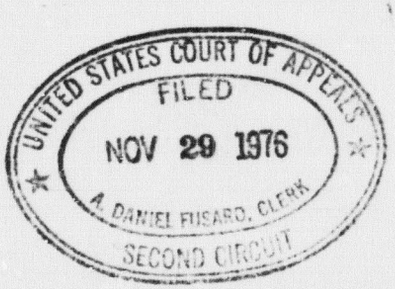
P/S

BRIEF FOR APPELLANT
LEONARD SHELTON

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
LEONARD SHELTON
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

PHYLIS SKLOOT BAMBERGER,
Of Counsel.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LEONARD SHELTON,

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-against-

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Docket No. 76-2099

BRIEF FOR APPELLANT LEONARD SHELTON

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

QUESTION PRESENTED

Whether appellant was improperly denied a parole revocation hearing during the term of his intervening sentence.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This appeal is from an order of the United States District Court for the Southern District of New York (The Honorable Whitman Knapp) entered on August 3, 1976, denying a petition for writ of habeas corpus filed on October 3, 1975, seeking release from custody which was based on a parole violation detainer and subsequent parole supervision.

The Legal Aid Society, Federal Defender Services Unit, was continued as counsel for the appeal, pursuant to the Criminal Justice Act.

Statement of Facts

A. Prior History[1]

On February 1, 1968, appellant was sentenced by the United States District Court for the District of New Jersey to a term of ten years' imprisonment, after a conviction pursuant to a plea of guilty to bank robbery. Thereafter, on November 23, 1970, appellant was released from the United

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[1]No evidentiary hearing was held in this case. The facts are revealed in the affidavits and exhibits presented to the district court.

States Penitentiary at Lewisburg, Pennsylvania (A[2]), on parole. He was subsequently arrested on July 19, 1971, by New Jersey state authorities. On November 1, 1971, he pleaded guilty to state robbery charges, and, on December 21, 1971, was sentenced to a term of six to eight years in prison.

The United States Board of Parole learned from appellant of his arrest and issued a parole revocation warrant on July 23, 1971 (B). The warrant does not state what the new crime was. On July 28, 1971, the Board lodged a detainer (C) with the New Jersey correctional officials. It was not until January 11, 1972, that appellant was notified of the detainer (D).

Apparently, some time in April 1972, appellant requested that the parole violation sentence be made to run concurrently with his state term of imprisonment, which he was serving at the New Jersey State Prison at Leesburg (E). After receiving a report from state prison authorities indicating that appellant's adjustment at the institution was excellent (F, G), a case analyst of the Board of Parole gave a dispositional review, considering the new crime to be armed robbery (E). Without any statement of the reasons or the facts relied upon, the Board ordered the detainer to stand (H).

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[2]Letter references in parentheses refer to documents in the separate appendix to appellant's brief. Parole Board documents were certified by the Board as part of its case in opposition to a proceeding for petition for writ of habeas corpus brought by appellant in the United States District Court for the District of New Jersey during his term of custody at the State Prison at Leesburg. See infra at 7, n. 3.

The similar dispositional review, with like result, took place in April 1973 (I-L) after appellant asked for disposition of the detainer (see K). The report of the state prison authorities was that appellant's job performance was exceptionally good, that his behavior and attitude were very satisfactory, and that his work in the college program was satisfactory. Overall progress and adjustment were evaluated as excellent (J).

In a letter received by the Board on June 18, 1973, appellant requested a concurrent sentence, referring to his attempts at rehabilitation and improvement (M). In response to this request, the Board sent appellant its "Form P-2," stating that it would take no action (N).

By letter dated December 15, 1973, appellant again requested concurrent sentences, indicating his desire to continue his education at the release education program at Glasboro Community College and his opportunity to earn a bachelor's degree (O). Again the Board sent appellant its Form P-2, stating that it would take no action (P).

In May 1974 appellant requested that the Board obtain a report from the state officials (Q). At that time, New Jersey officials sent the Board an excellent report (R):

> Mr. Shelton is a full time student in Mercer Community College Prison Education Program. He is a Community Service major and is presently doing well in all his classes.
>
> In all counseling sessions, Leonard

> has been friendly and cooperative. He shows high initiative and motivation and fine Academic Planning. He is a member of the Student Advisory Board and Co-founder of Paeuma Fraternity.
>
> Enclosed please find a copy of Leonard's transcript. I predict continued success for Leonard.

In August, the Board responded only that appellant's next review would take place in January 1975 (S).

During the term of his state sentence, appellant participated in the two-year educational program, at the conclusion of which he received an associate's degree in community service from Mercer County Community College. However, the presence of the federal parole detainer precluded his participation in an education release program at the facilities of the Glasboro State College, for which he was otherwise eligible (T).

At least one month prior to appellant's scheduled release from New Jersey custody, Michael J. Marucci, Esq., of the New Jersey Public Defender's office, advised the United States Department of Probation in the District of New Jersey of the date of appellant's release (Record on Appeal, Document #1, at 2).

On September 8, 1975, appellant was released to the custody of federal officials and was brought to the Metropolitan Correctional Center in New York City. On September 18 or 19, 1975, two members of the Probation Department for the District of New Jersey spoke with appellant at the Metropolitan Correctional Center. At that time, appellant requested a local re-

vocation hearing and counsel. The probation officials advised him that he might be returned to the United States Penitentiary at Lewisburg, Pennsylvania, despite his request.

A United States Magistrate for the Southern District of New York assigned The Legal Aid Society, Federal Defender Services Unit, as counsel for appellant.

Appellant's social worker at the Metropolitan Correctional Center advised him that he was to be returned to Lewisburg immediately (Record on Appeal, Document #1, at 3).

B. The Petition

On October 16, 1975, a petition for writ of habeas corpus was filed in the United States District Court for the Southern District of New York. In the petition and the memorandum, the District Court was advised of the facts of the case as outlined above.

The district judge was also advised that the Parole Board was scheduled to meet at Lewisburg on October 20, 1975, and that, as of October 16, 1975, the calendar for the October 20 meeting was closed, that the Board was not expected to meet at Lewisburg again until the first or second week of December, and that the next meeting of the Board at the Metropolitan Correctional Center was scheduled for November 3, 1975. Thus, a transfer to Lewisburg would have delayed a hearing until December.

The petition for writ of habeas corpus requested appel-

lant's re-release on parole because the four-year delay in giving him his parole revocation hearing had denied him due process. Appellant also sought a prompt local parole revocation hearing.[3]

On October 28, 1975, after oral argument on the motion for the writ of habeas corpus, the district judge suggested that the local parole violation hearing be granted at the Metropolitan Correctional Center since appellant was in custody there and the U.S. Board of Parole was scheduled to meet there on November 4. The court made clear, however, that the hearing was not to prejudice the requested greater relief of dismissal of the detainer and release on parole with credit for service of the term from the date of the issuance of the parole violation warrant.

C. The Parole Hearing

On November 4, 1975, a parole revocation hearing was held at the Metropolitan Correctional Center. Present at the hearing were appellant, his counsel, his parents, and Mr. Edward

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[3]The petition also revealed that in October 1974, prior to his release from the New Jersey state facility, appellant filed a petition for writ of habeas corpus in the United States District Court for the District of New Jersey (Civ. No. 74-1626). The petition sought release unless a parole revocation hearing was given. At the time of the filing of the petition in the Southern District of New York, counsel was advised by the clerk of the New Jersey District Judge that the petition was to be denied based on the unreported Third Circuit opinion in Orr v. Saxbe, No. 75-1042, affirming the New Jersey District Court opinion in that case (Civ. No. 74-341).

Williams, who was appellant's education adviser at the New Jersey State Prison at Leesburg (Record on Appeal, Document #10). Presented to the Board were two letters from Dr. Gregory O. Gagnon, the director of the New Jersey prison education network (U, V), and a transcript of grades appellant had earned in the prison education program (W) sponsored by Mercer County Community College and Cumberland County College.

At the proceeding, appellant explained the mitigating circumstances concerning the crime. The robbery, he said, came about because he had taken a loan from some men who demanded payment at a time when he had insufficient funds to make repayment. The creditors' demands were enforced by a beating that resulted in hospital treatment for appellant's head wounds. This desperate need for funds precipitated the robbery (see Record on Appeal, Document #11; X).

Mr. Williams explained that appellant had participated in the prison education program at Leesburg, and stated that appellant was an excellent student, cooperative and willing to work, and that Williams believed that appellant could lead a law-abiding and successful life in the community. The letters from Dr. Gagnon explained the prison education program at Leesburg, discussed appellant's achievements in the program, noted his high grade average, referred to the study-release program, and concluded that, but for the detainer, appellant would have been able to participate in that program.

The grade transcript indicated that appellant began

taking classes during the summer of 1972, some three months after his arrival at Leesburg. The transcript shows that he continued through graduation in June 1975 and that he achieved a grade point average of 3.20.

The Board was also given a letter from Jack Schmelzer (Y), then coordinator of off-campus programs. That letter stated that appellant was a student of Schmelzer's during the fall of 1973 and that he received an "A" as his grade. Schmelzer's letter praised appellant's participation, attitude, and abilities.

Despite requests for disposition of the federal detainer, there is nothing to show that during petitioner's four-year period of custody at Leesburg the Board considered appellant's scholastic record or made any inquiries of anyone associated with the education program for a report on appellant's status.

The Board of Examiners revoked parole, one examiner stating that this was, of course, the result of the new conviction, and expressed the view that appellant should be released on January 20, 1976, to a plan of college study, residence, and financing. Earlier release was not granted because of appellant's long period of state custody without furlough or release. Counsel advised the examiners that furlough and release were not permitted because of the pendency of the federal detainer (Record on Appeal, Document #11).

On November 28, 1974, the Board of Parole affirmed the decision of the examiners to revoke parole and to re-parole

as of January 20, 1976. Appellant was released on that day.

D. The Decision on the Motion

Additional argument was held on the petition on December 17, 1975. On August 6, 1976, the district court denied the petition. Although Judge Knapp agreed with those cases that criticized the Parole Board's procedures, he found that there was no jurisdiction under 28 U.S.C. §2241 in the Southern District of New York and that the writ should have been brought in the District Court for the District of New Jersey (Z).

ARGUMENT

APPELLANT WAS IMPROPERLY DENIED A PAROLE REVOCATION HEARING DURING THE TERM OF HIS INTERVENING SENTENCE.

A. Introduction

The issue raised by this case is whether appellant was entitled to a dispositional hearing on his federal parole violation detainer during the service of his intervening New Jersey sentence. The underlying questions are whether appellant had a liberty interest that was prejudiced by the refusal of the then Federal Parole Board[4] to grant a hearing, and whether, even if there was no liberty interest, the Board abused its discretion and failed to follow its own regulations by refusing to grant the hearing.

Resolution of the issues is necessarily affected by the recent decision in Moody v. Daggett, 45 U.S.L.W. 4017 (Sup.Ct., Nov.15, 1976). In that case, Moody was on federal parole from a federal conviction when he committed a new federal crime. Although in 1972, prior to the passage of the Parole Commission and Reorganization Act, Pub.L. 94-233, 90 Stat. 210 et seq. (1976) (hereinafter "the Act"), he asked for concurrency

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[4]The Board is now called the Parole Commission. Parole Commission and Reorganization Act of 1976, 18 U.S.C. §4202.

of his two sentences,[5] he presented no mitigating evidence to

[5]This was one of three dispositions available to the old Board. The Supreme Court described the three in Moody:

> After review -- or interview -- the Board had three options for disposing of its parole violator warrant:
>
> (a) it could execute the warrant immediately and take the parolee into custody. If parole was revoked at that stage, the remainder of the parolee's original federal sentence, reinstated by the parole revocation, would run concurrently with the subsequent sentence from the time of execution of the warrant. 18 U.S.C. §4205 (1970 ed.). Execution of the warrant deprived the parolee of any goodtime credits he may have previously earned on his original sentence under 18 U.S.C. §4161, and of credit for the time spent while on parole. 18 U.S.C. §4205 (1970 ed.); 28 C.F.R. §2.51 (1975).
>
> (b) The Board's second option was to dismiss the warrant and detainer altogether, which operated as a decision not to revoke parole, and under which the parolee retained both his goodtime credit and credit for the time spent on parole. Presumably dismissal of the warrant would reflect a Board decision that the violation of conditions of parole was not of such gravity as to justify revocation.
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> (c) Third, the Board was free to defer a final decision on parole revocation until expiration of the subsequent sentence, as it elected to do in this case; under this third option, the Board was authorized to execute the warrant, take the parolee into custody immediately upon his release, and then conduct a revocation hearing. Deferral of this decision while permitting the warrant to stand unexecuted would operate to allow the sentence to remain in the status it occupied at the time of the asserted parole violation. 18 U.S.C. §4205 (1970 ed.); it would not deprive the parolee either of his goodtime or of the time spent on parole.
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> 45 U.S.L.W. at 4018-4019.

the Board and was told that the Board would execute the parole violation warrant upon his release from the second sentence.[6]

Moody filed a petition for writ of habeas corpus. The writ was denied, and the order affirmed on appeal. After the Supreme Court granted a writ of certiorari, the Act was passed. The Act, as well as the newly promulgated rules of the United States Parole Commission, 41 Fed. Reg. 19340 (May 12, 1976), became effective on May 14, 1976. A revised set of rules was promulgated on August 27, 1976 (41 Fed. Reg. 37316, September 3, 1976), effective as of October 4, 1976).

In its decision, the Supreme Court found that Moody had no protected liberty interest and that postponement of the hearing until after he was in custody solely pursuant to the parole violation warrant was thus not a constitutionally defective procedure.

The Court found no liberty interest derived from the present custody because that custody was due to the new conviction and not to the parole warrant. The Court found that, under the new statute, the Parole Commission could give the effect of concurrent sentences (alternative (a) as outlined by the Supreme Court; see fn.5, supra, at 12) when it would give Moody his revocation hearing at the end of the intervening sentence. The Court also concluded that there was no protected interest in rehabilitation programs in the federal

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[6]This was the Board's third option.

system that might be denied to Moody because of the detainer. Three additional factors were mentioned by the Court: first, that since Moody was in the jurisdiction of the same parole authority for both parole release on the new conviction and revocation of parole from the first term of custody, he could use his parole release hearing, with the procedural protections afforded under the Act, to convince the parole officials to revoke parole; second, that the institutional record is a significant factor in arriving at the dispositional decision; and third, that if claims of mitigating evidence are made, "the Commission has the power, as did the Board before it, to conduct an immediate hearing at which petitioner can preserve his evidence." 45 U.S.L.W. at 4020, n.9.

The circumstances in the present case are so substantially different from those in Moody that they require a different result. Furthermore, this case presents legal issues concerning the Board's procedures upon which the Court did not rule in Moody.

B. Appellant had a liberty interest, and thus had a due process right to a revocation hearing prior to the conclusion of his intervening sentence.

Unlike Moody, where no dispositional decision has as yet been made, the Board made its decision to revoke Shelton's parole on November 4, 1975. Since this was prior to the effective date of the new Act, the Act has no effect on either

the decision or its results. Consequently, appellant cannot receive any benefit from the new Commission's power, as the Supreme Court found, to give the equivalent of concurrent sentences retroactively. Under the now superseded regulations, the Board had no such power; accordingly, once appellant's intervening sentence had been served prior to the Board's decision, there was no opportunity for concurrency.[7] This can be seen by examining the Board's rules.

Of the three dispositional options available to the Board, it rejected appellant's numerous requests for concurrent sentences, and chose to wait to act until the conclusion of service of the intervening sentence. At the parole revocation hearing given at the conclusion of the intervening term of custody, the Board had the same dispositional options it had when the violation was something other than a new conviction. As stated in former 28 C.F.R. §2.55(c) (1975) and §2.55(b) (1975), upon a finding of a violation at a parole revocation hearing, the Board could have either revoked parole or reinstated to supervision. The finding of a violation did not require revocation (Esquivel v. United States, 414 F.2d 607, 608 (10th Cir. 1969); Brown v. Taylor, 287 F.2d 334 (10th Cir. 1961), cert. denied, 366 U.S. 970 (1962); United States ex rel. Obler v. Kenton, 262 F.Supp. 205, 208 (D. Conn. 1967); United States ex rel. Vance v. Kenton, 252 F.Supp. 344, 346 (D. Conn. 1956); Parole

[7] This issue was fully briefed and argued before Judge Knapp. See Record on Appeal, Document #13.

Revocation in the Federal System, Geo. L.R. 705, 731, 735-736 (1968)), and despite such a finding the Board could reinstate to parole supervision. This reinstatement resulted in no loss of credit to the parolee as against his sentence:

> In the absence of a local revocation hearing, the alleged violator is returned to a federal institution to await his revocation hearing at the next visit by a representative of the Board. Following the hearing, the Board determines either that the release be revoked or that there is insufficient cause for revocation. In that latter eventuality, the person is released to further supervision in the community, and the time between the issuance of the warrant and his return to the community is counted toward the running of his sentence.
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> Annual Report, THE UNITED STATES BOARD OF PAROLE (July 1, 1972 - June 30, 1973) at 27.

On the other hand, the effect of revocation was to require loss of credit for all time from the date of release on parole (18 U.S.C. §4205 (1970); 28 C.F.R. §2.51 (1975); Peacock v. Hughes, 427 F.2d 359 (5th Cir. 1970); Canavari v. Richardson, 419 F.2d 1287 (9th Cir. 1969), and cases cited therein), as well as earned goodtime. McKinney v. Taylor, 358 F.2d 689 (10th Cir. 1966).

The parolee was credited with the time only from the date of execution of the warrant, which meant from the date of his arrest and return to custody (18 U.S.C. §4205 (1970); 28 C.F.R. §§2.51, 2.52(a) (1975). After his return to custody, the Board could compel the parolee to serve any unexpired time up to the

maximum release date[8] (18 U.S.C. §4207 (1970)), in this case, 2,393 days.

Thus, "revocation" and "reinstatement," considered in the context of the other provisions of Title 18 and the regulations, especially those relating to the running and crediting of time (Mastro Plastics Company v. Labor Board, 350 U.S. 270, 285 (1956)), precluded retroactive effect: reinstatement gave total credit; revocation resulted in receipt of credit only from the moment of execution of the warrant, i.e., custody. Thus, to speak in terms of retroactive credit is meaningless.

The policy statement of the Board of Parole demonstrates that the Board did not view itself as having the power to give retroactive credit to a parolee at a final revocation hearing delayed until after completion of an intervening sentence. In its directive effective January 1, 1971, the Board stated: "The prisoner will ordinarily be required to serve the period of that [new] sentence before the hearing is held on such [new crime] violation," and, the Board's statement continued, his violator time "will be served consecutively to the new sentence." Then the Board outlines the procedure by which the parolee may, prior to execution of the new sentence, seek permission to serve some part of the violator sentence con-

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[8]"Unexpired term" meant the number of days of the sentence remaining as of the date of parole. McKinney v. Taylor, supra, 358 F.2d at 690.

currently with the new sentence. It is thus clear that the Board viewed the opportunity for concurrent credit as existing only during the duration of the intervening sentence and that, in cases in which the hearing was held after completion of the new sentence, the violator sentence would have run consecutively.

Consistent with the language and scheme of the statutes and regulations and with the Board's policy is the fact that in no other litigation involving a claim that a delayed hearing resulted in prejudice due to the lost opportunity for concurrency has the Board claimed the power to give retroactive sentences. No court found such a power to exist under the old statute and regulations. Since if this power existed many cases could be resolved in the Board's favor, the failure of the Board to make the argument is evidence that the Board had no such power.

For example, in The Parole Board Cases, Smith v. Rivers, White v. U.S. Board of Parole, and Jacobs v. District of Columbia Board of Parole, 388 F.2d 567, 575 (D.C. Cir. 1967), the parolees had been convicted of a new crime while on federal parole. Federal parole detainers were lodged against them but left unresolved. The parolees admitted that they had violated parole. They argued, however, that the Board had a choice of dispositional options:

> ... (1) It may excuse the violation altogether and withdraw its warrant. (2) It may immediately revoke parole. By

> that action, the parolee is permitted to serve the unexpired portion of his original sentence concurrently with any new sentence imposed for the act constituting the parole violation. (3) It may withhold revocation until the parolee has completed service of his intervening sentence and then revoke parole. That course results, in effect, in consecutive as contrasted with concurrent service of sentence. That is, the violator serves the unexpired portion of his original sentence separately from -- usually after -- the sentence imposed for the criminal offense constituting the violation.
>
> Id., 388 F.2d at 575-576. (Footnotes omitted).

The parolees further argued that the Board's procedures gave them no fixed procedural method for presenting evidence in an effort to get the more favorable dispositions. See id., 388 F.2d at 576, n.16, n.20.

The Court of Appeals stated:

> We are not prepared to hold that failure to afford a procedure whereby the violator may seek a favorable disposition or an outright refusal to consider proffered evidence in mitigation is immune from judicial review.
>
> Id., 388 F.2d at 576.

However, the court did not render any decision on the issue because counsel for the Board (id., 388 F.2d at 578) advised the court of a change in the rules that would afford a procedure. See 32 Fed. Reg. 15014 (1967). The procedure adopted was the discretionary dispositional interview -- the one incorporated in 28 C.F.R. §2.53 (1975). The attorney for the

Board never argued that retroactive credit was possible, although if that were the Board's position, no change in the Board's procedure would have been necessary.

All the more recent cases show the similar absence of such an argument. For example, in United States ex rel. Hahn v. Revis, 520 F.2d 632 (7th Cir. 1975), mandate recalled, No. 75-1041 (August 27, 1975), there was a one-year delay in granting a hearing after a state conviction. The Court of Appeals found the delay improper and found that anything less than full release from the restraint of the detainer would leave the parolee with a right without a remedy. Had the Board been able to give retroactive credit after a hearing held at the conclusion of the new term, such a remedy would have been unnecessary, but no such power was urged by the Parole Board.

Similar facts were presented in Cleveland v. Ciccone, 517 F.2d 1082 (8th Cir. 1975), where the Board's own attorney appeared as amicus curiae. Still no argument for the power of granting retroactive concurrency was ever made.

In Gaddy v. Michael, 518 F.2d 669 (4th Cir. 1975), petition for cert. filed August 5, 1975, Doc. No. 75-5215, the Court of Appeals decided against the parolee, saying simply that the "lost opportunity" for concurrency was not prejudice, since the Board could, in its discretion, delay a hearing. Similarly, in Jones v. Johnston, 534 F.2d 353, 364 (D.C. Cir. 1976), petition for cert. filed September 17, 1976, sub nom. Sigler v. Byrd, Doc. No. 76-355, the Board did not argue that

it had the power to grant retroactively concurrent terms.

Indeed, while in the proceedings below the Government argued in favor of such a power's existence, no reference was made that would support a conclusion that there was such a power -- no practice, no policy, no statement. The attorney's own interpretation of the power does not have any weight. See Investment Company Institute v. Camp, 401 U.S. 617, 628 (1971).

Since there was no power of the Board to give retroactive credit, the delayed hearing deprived appellant of the very substantial opportunity to get concurrent sentences. It precluded consideration for that purpose of the uncontradicted and unique mitigating circumstances revealed by appellant when he finally did get his hearing concerning the commission of the second crime. Appellant disclosed that he had been beaten by people from whom he had boorowed money and that the new crime resulted from his desperate need to obtain funds tc repay them. Appellant also revealed to the Board that the robbery of a supermarket was conducted with an inoperative replica of a gun, and therefore was not armed robbery, as is indicated in the Board's records. These were factors apparently not previously known by the Board and thus not considered by the examiners in making their record review decisions during the intervening term of custody.

Accordingly, the Supreme Court's conclusion that, under the Act, no liberty interest is interfered with by postponement of the hearing does not apply here. With the Act not

applicable, the postponement of the hearing lengthened the term of total custody or total conditional release on parole. While this is a future deprivation of liberty, protection of future liberty interests is established. Wolff v. McDonnell, 418 U.S. 529 (1974); Peyton v. Rowe, 391 U.S. 54 (1968). Further, the Commission's present ability to terminate parole early (18 U.S.C. §4211) does not cure the defect, since the factors that are likely to be considered in determining whether to terminate parole supervision earlier than required would necessarily relate to the parolee's conduct while on the parole term under consideration. As the most recent events, they would carry more weight than circumstances in mitigation of the crime or conduct while in custody on the intervening sentence.

C. The Board failed to follow its procedures; accordingly, appellant was deprived of the opportunity to demonstrate that the concurrent running of the sentences should have been permitted.

In its brief in Moody, the Government outlined the procedures the Parole Board was expected to use in cases such as appellant's. The Government said that the Board's procedure was to notify the parolee that a detainer had been lodged (Moody brief at 6) and that the Board was to review the case promptly (Moody brief at 39). Prior to the initial file review, the Board's procedure was to invite the parolee to

respond (Moody brief at 6-7, 39). Indeed, the parolee was supposed to be advised "that he may communicate with the Board relative to the disposition of the warrant." See 32 Fed. Reg. 15014, §2.37(c) (October 31, 1967).[9] It is generally understood that this information might relate to the new crime or to the parolee's reputation in the community. Jones v. Johnston, supra, 534 F.2d at 361. A prompt dispositional interview would be given if a parolee presented information that, if true, would lead to revocation of parole or withdrawal of the detainer (Moody brief at 6). Further, according to the Government, evidence was to be received at the hearing if it would affect the Board's decision (Moody brief at 6, 39). The Government also asserted (Moody brief at 6) that if no hearing was held or an unfavorable decision rendered, an annual file review would be conducted.

Under the outlined procedure, the Board was supposed to give the parolee notice of his right to present mitigating evidence. However, it does not appear that appellant was told that the Board charged as the violation an armed robbery or that he was told what evidence in mitigation he might present. Nor

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[9]This section was the one to which the Board of Parole referred in Smith v. Rivers, supra, to amend the Rules published earlier at 27 Fed. Reg. 8487 (August 24, 1962). All the regulations were republished at 28 C.F.R. at 82 et seq. (1974) when the Parole Board also published revised experimental rules, 39 Fed. Reg. 20028 (June 5, 1974), which were initially applicable only to the Northeast Region of the Parole Board, and then were expanded to the Western and South Central Regions of the Board. 39 Fed. Reg. 23261 (June 27, 1974).

was he given any explanation of what, other than a request for disposition, such a communication might contain. There is nothing in the Board's file to indicate that appellant was told or that he understood that he might present evidence in mitigation concerning his crime, and there is no basis for concluding that appellant knew what, other than his prison record, he could present to the Board.

Since appellant was not apprised of what he might present to the Board, the mitigating evidence presented during the term of the intervening sentence consisted only of a letter from appellant's counselor dated May 14, 1974, and reports from the institution dated May 17, 1972, and May 17, 1973, stating that he had an excellent institutional work record. While this was significant information, there was obviously other important material to present to the Board.

At the parole revocation hearing held after appellant was taken into federal custody, appellant informed the Board of the circumstances of the underlying crime, indicating that he was compelled to seek money because his creditors had beaten him and that, although the Parole Board had classified his crime as armed robbery (E), he had not used a weapon in the commission of the crime, but had held only an inoperable replica of a gun.[10]

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[10]Since, under the Act, the parolee is now entitled to notice of the violation charged, to be represented by counsel (18 U.S.C. §4214b), and to examine the parole file (Shepard v. U.S. Board of Parole, Doc. No. 76-2021, slip op. 5413 (2d Cir., September 7, 1976)), it is likely that the Commis-

However, even with respect to appellant's prison record, the Board, which displayed a less than interested attitude in appellant's achievements, asked for no information to supplement the institution's basic report.

At the final hearing, appellant presented three letters not previously given to the Board, apparently because they were never requested, from supervisors in the education program. Gregory Gagnon, director of the program, wrote that Mr. Shelton's grades and his obtaining of an associate's degree "required intelligence and perseverance beyond that required in the Free World." A teacher of Mr. Shelton's, Jack Schmelzer, also had high praise for Mr. Shelton's work.

The significance of the Board's failure to give notice of the right to present evidence in mitigation is demonstrated by the Government's assertion that the discretionary hearing that might be granted during the intervening sentence would be given if a parolee presented information which, if true, would lead to revocation of parole or withdrawal of the detainer (Moody brief at 6). In Moody v. Daggett, supra, 45 U.S.L.W. at 4020, n.9, the Court relied on the fact that the Board had the power to give the discretionary hearing on an adequate showing of facts. Here, the Board could not exercise its discretion properly because appellant was not aware of what facts would

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sion examiners will be advised earliy in the procedures that they have asserted as a violation conduct more serious than that which resulted in the conviction.

constitute a sufficient showing. Finally, appellant lost all opportunity to present his evidence at a time when it would have been most beneficial to him.

The Board's failure to follow its own procedures, with the resulting prejudice, constitutes a violation of due process, requiring relief. Burton v. Ciccone, 484 F.2d 1322, 1324 (8th Cir. 1973); Masiello v. Norton, 364 F.Supp. 1133, 1136 (D. Conn. 1973); see also Yellin v. United States, 374 U.S. 109, 114 (1963); Vitarelli v. Seaton, 359 U.S. 535 (1959); Service v. Dulles, 354 U.S. 363 (1957); Accardi v. Shaughnessy, 347 U.S. 260 (1954); Christoffel v. United States, 338 U.S. 84 (1949); Bonham v. Resor, 436 F.2d 751, 754 (2d Cir. 1971); Smith v. Resor, 406 F.2d 141, 145 (2d Cir. 1969); United States v. Jones, 368 F.2d 795 (2d Cir. 1966); Shelton v. United States, 327 F.2d 601, 605 (D.C. Cir. 1963).[11]

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[11] One further factor is relevant with respect to the Board's decisionmaking process. In Moody, the Supreme Court noted the importance of prison conduct and rehabilitation in making a disposition. Here, the Board, in making its decision on when to re-parole appellant, considered adverse to him the fact that, during his state sentence, he was permitted no furloughs or work and education release. The unbroken period of custody was considered adversely to appellant. At the parole revocation hearing, counsel advised the examiners that the reason for the continuous confinement was the unresolved federal detainer.

This reaction by the Board to events produced by its own conduct is unfair to appellant, who established that he had progressed as far as he could under the limitations resulting from the presence of the detainer. Indeed, appellant sought, albeit in vein, to get the Board to reconsider its inaction so that he could participate in the education release program, advising the Board that the detainer was preventing him from advancing.

This issue was not determined by Moody, because no evidence in mitigation was shown by the parolee. Here, of course, the evidence was in existence, but appellant was not aware of its relevance until the Board's hearing, by which time it was too late to benefit him.

D. The presence of dual jurisdiction prevented appellant's use of the release hearing to show why the detainer should not be disposed of so as to prevent delay in release.

In Moody, the Court considered significant that the same parole authority was to determine both parole release from the new sentence and the parole revocation disposition. Accordingly, at the parole release hearing that was to be conducted in the parolee's presence, with counsel and disclosure of the parole file, after service of one-third of the sentence, the parolee could make his arguments with respect to revocation. This procedure would prevent the detainer from prejudicing parole release. However, the Court left open the question of what was required where two jurisdictions were involved. In such cases, the detainer would be a factor affecting parole release.

The advantages arising from consideration by one body did not occur here, since appellant was released on parole by the New Jersey State Parole Board to the warrant and detainer to be determined by the Federal Board. Accordingly, release

on parole by the New Jersey officials may have been delayed by the federal detainer, to which appellant could not fairly respond and which affected his ability to participate in prison programs that might have advanced his release date.

E. The United States District Court for the Southern District of New York had jurisdiction to decide this case.

The basis of the opinion of the district judge was that he had no jurisdiction. He told appellant to bring his application in the New Jersey District Court.[12] The reasoning of the District Court is not correct, since this is a most traditional habeas corpus situation. Appellant was in custody at the Metropolitan Correctional Center in the Southern District of New York when the petition for writ of habeas corpus was filed with the district court. That custody was premised on the appellee's conduct in giving effect to a parole violation warrant that was challenged as invalid. Both the challenged custody[13] and the custodian were within the territorial confines of the Southern District of New York. Since the court acts against the custodian, the required jurisdiction is present.[14] Braden v. 30th Judicial Circuit Court of Ken-

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[12]Despite the numerous memoranda of law filed by counsel with the district court, neither the Government nor the district court sua sponte ever raised this as an issue, and it was never addressed by either party.

[13]The attack was obviously not based on the underlying conviction and sentence, and thus 28 U.S.C. §2255 is inapplicable.

[14]Although not raised by either the court or the Government, there can be no claim here that appellant was forum shopping. Compare Williams v. United States, 481 F.2d 339 (2d Cir. 1973). Appellant, claiming that the federal detainer was prejudicing his right to participate in state prison programs, brought suit in the District Court of New

tucky, 410 U.S. 484, 495 (1973);[15] see also Zaffarano v. Fitzpatrick, 404 F.2d 474, 478 (1968), cert. denied, 395 U.S. 977 (1969).

Even the release of appellant on parole and his parole supervision in New Jersey does not remove jurisdiction from the Southern District of New York. Jones v. Cunningham, 371 U.S. 236, 243 (1963). The Parole Board, a party to this law suit, and its successor, the Parole Commission, are divided by regions. The Northeast Region includes both New York and New Jersey, and the Commission and Board have a "presence" in both states.

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Jersey seeking removal of the detainer. See George v. Nelson, 399 U.S. 224 (1970). Before the New Jersey district court had rendered a decision, appellant was transferred from Leesburg to the Metropolitan Correctional Center. He waited at MCC for five weeks without receiving his requested local hearing. He was finally told he would be transferred to Lewisburg without a hearing. The next scheduled hearing date would have been two months later. Thus, to get his hearing at all and to get it locally, as well as to challenge the validity of the detainer, appellant had to bring his suit in the Southern District of New York.

[15] Even the now repudiated requirement that the petitioner be in the jurisdiction is present here. See Ahens v. Clark, 355 U.S. 188 (1948), overruled in Braden.

CONCLUSION

For the above-stated reasons, the order below should be reversed and appellant released from parole supervision unless he is credited with the time from the date of the issuance of the parole warrant to the date of his release.

Respectfully submitted,

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
LEONARD SHELTON
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

PHYLIS SKLOOT BAMBERGER,
Of Counsel.

CERTIFICATE OF SERVICE

Nov. 29, 1976

I certify that a copy of this brief ~~and appendix~~ has been mailed to the United States Attorney for the Eastern District of New York.

Phyllis Skloot Bamberger